Filed 4/1/10 P. v. Enciso CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MARIO ENCISO, Defendant and Appellant.	E046967 (Super.Ct.No. RIF139178) OPINION

APPEAL from the Superior Court of Riverside County. Rodney L. Walker, Judge. Affirmed with directions.

Cathy A. Neff, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

A jury convicted defendant and appellant Mario Enciso of possession of a firearm by an ex-felon (Pen. Code, § 12021, subd. (a)(1), count 1)),[1] resisting arrest with the threat of violence (§ 69, count 2), and possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a), count 4).[2] Defendant admitted as true the allegation that he had suffered one prior strike conviction for robbery (§§ 667, subds. (c) and (e)(1), 1170.12, subd. (c)(1).) The court sentenced defendant to three years in state prison on count 1, plus eight months on count 2, doubled for the strike conviction. The court sentenced defendant to two years on count 4, to run concurrently with the sentence on counts 1 and 2. His total sentence was seven years four months.

Defendant filed a timely notice of appeal. We note the abstract of judgment reflects defendant was convicted by a plea. However, defendant was convicted by a jury. We remand the matter for the abstract of judgment to be corrected accordingly. Otherwise, we affirm.

FACTUAL BACKGROUND

On October 10, 2007, Officer Jeffery Putnam was on patrol in a marked police vehicle. He noticed a car approaching him at a high rate of speed. The car passed him, so Officer Putnam made a U-turn and got behind the car. He performed a records check on the license plate and discovered the car had an expired registration. Officer Putnam

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[1] All further statutory references will be to the Penal Code, unless otherwise noted.

[2] The jury acquitted defendant of count 3, receiving stolen property. (§ 496, subd. (a).)

followed the car into a parking lot and pulled in directly behind it. The driver of the car, later identified as defendant, got out of the car and immediately started walking toward the officer's car. Officer Putnam exited the patrol car and told defendant to stop. He asked defendant about the expired registration, and defendant said he did not know it was expired. While they were talking, two passengers got out of defendant's car but stayed close to the car. Defendant motioned for them to go into the store. Officer Putnam became concerned for his safety, so he advised defendant that he was going to do a patdown search. Defendant agreed, but when Officer Putnam attempted to secure defendant's arm, defendant quickly pulled it back and ran away. Officer Putnam chased him through the parking lot, yelling for him to stop running. The officer noticed that defendant's hands were wrapped in front of his waistband area as he was running. Defendant then made an abrupt right turn, retrieved a "large black object" from his waistband, and threw it over a fence into a vacant parking lot. Defendant fell down, got up, and ran into a corner, where the store and the fence met. Defendant turned around to face Officer Putnam, clenched his fists, raised them up into a boxer's stance, and yelled, "You want to punch me in the face . . . I'm going to ____ you up." Officer Putnam "open-field tackled" defendant and pinned him against the wall. Defendant started reaching for his waistband, so Officer Putnam picked him up and "body-slammed him onto the ground." Officer Putnam landed on defendant's back and was starting to restrain him when defendant said, "I give up."

Officer Putnam searched defendant and found a small metal flashlight in his front pocket. Inside the battery compartment, the officer located a small bag containing what

he believed to be marijuana, some Ziploc baggies, and a glass pipe commonly used to smoke methamphetamine. Inside the pipe, the officer observed a white crystalline substance, as well as a large piece of what appeared to be burnt methamphetamine. The substance tested positive for methamphetamine.

ANALYSIS

Dependant appealed, and upon his request, this court appointed counsel to represent him. Counsel has filed a brief under the authority of *People v. Wende* (1979) 25 Cal.3d 436, and *Anders v. California* (1967) 386 U.S. 738 [87 S.Ct. 1396, 18 L.Ed.2d 493] (*Anders*), setting forth a statement of the case and several potential arguable issues, including: 1) whether the court erred in denying defendant's *Marsden*[3] motion; 2) whether defendant was denied his right to a speedy trial; 3) whether the trial court abused its discretion in failing to strike his strike conviction; 4) whether the jury should have been instructed with the unanimity instruction (CALJIC 17.01) as to count 2; 5) whether defendant was properly advised when he admitted the prior strike conviction; 6) whether the jury should have been instructed on the definition of an admission (CALJIC 2.71) with regard to count 2; and 7) whether the jury should have been instructed with CALJIC 2.72 (corpus delecti must be proved independent of an admission or confession) with regard to count 2. Counsel has also requested this court to undertake a review of the entire record. Pursuant to the mandate of *People v. Kelly* (2006) 40 Cal.4th 106, we have conducted an independent review of the record.

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[3] *People v. Marsden* (1970) 2 Cal.3d 118.

We offered defendant an opportunity to file a personal supplemental brief, which he has done. Defendant argues that his right to a speedy trial was violated, citing section 1382.[4] "Section 1382, which interprets the state constitutional right to a speedy trial (see Cal. Const., art. I, § 15), provides that absent a showing of good cause, a defendant accused of a felony is entitled to a dismissal of the charges against him if he is not brought to trial within 60 days of the filing of the information." (*People v. Johnson* (1980) 26 Cal.3d 557, 561.) Defendant was not brought to trial within 60 days of the filing of the information. The last day for trial was July 14, 2008, but the court found good cause and granted the prosecution's request for a continuance to July 24, 2008. Defendant specifically contends that the prosecution failed to provide any competent evidence in support of its request for a continuance. He further asserts: "The fact that a witness plans to be on vacation cannot alone constitute good cause for a continuance past a section 1382 deadline," without a showing that the five criteria listed in *Owens v. Superior Court* (1980) 28 Cal.3d 238, 250 (*Owens*) are met. We conclude that the court properly granted the continuance and that defendant's speedy trial rights were not violated.

[4] We note that defendant previously filed a petition for writ of mandate on the exact same issue. This court denied the writ.

The prosecution here moved to continue the trial to July 24, 2008, because Officer Putnam would be unavailable to testify due to a prepaid vacation (he would be out of state from July 13 to July 23, 2008) and because defense counsel had requested discovery, which had not yet arrived. The court held a hearing on the matter on July 9, 2008. Defense counsel indicated he no longer needed the discovery that was pending and was ready for trial. The court asked the prosecutor if he had proof of service of a subpoena on Officer Putnam. The prosecutor informed the court that he had spoken with Officer Putnam and found out about his vacation plans; thus, a subpoena was never issued. The court then referred to section 1050, subdivision (g)(1), which provides: "When deciding whether or not good cause for a continuance has been shown, the court *shall* consider the general convenience and prior commitments of all witnesses . . . ." (§ 1050, subd. (g)(1), italics added.) Thus, the court properly considered Officer Putnam's prior vacation commitment.

The court also referred to the factors in *Owens, supra*, 28 Cal.3d 238, which states that "'[in] order to invoke the discretion of the trial court to grant a continuance to obtain the presence of a witness, the moving party has the burden of showing that the following legal criteria have been satisfied: (1) That the movant has exercised due diligence in an attempt to secure the attendance of the witness at the trial by legal means; (2) that the expected testimony is material; (3) that it is not merely cumulative; (4) that it can be obtained within a reasonable time; and (5) that the facts to which the witness will testify cannot otherwise be proven.' [Citations.]" (*Id*. at pp. 250-251.) These criteria were met here, in that the prosecution attempted to secure Officer Putnam but found out he would

be unavailable, his testimony was clearly material and vital to the case since he was the officer who apprehended defendant, and the prosecution asked to continue the matter for only 10 days.

As to defendant's contention that the prosecution failed to provide competent evidence in support of its request for a continuance, section 1050, subdivision (g)(1) does specify any type of evidence required to show good cause. It only states that "[t]he facts as to inconvenience or prior commitments may be offered by the witness or by a party to the case." (§ 1050, subd. (g)(1).) Moreover, contrary to defendant's claim that the prosecutor only offered an unsworn statement as evidence, the record shows that the prosecution filed a declaration under penalty of perjury in support of its motion.

We further note that "a defendant seeking post-conviction review of denial of a speedy trial must prove prejudice flowing from the delay of trial . . . ." (*Johnson*, *supra*, 26 Cal.3d at p. 562.) Defendant has failed to do so.

Defendant additionally claims that his appellate counsel was "constitutionally mandated" to brief the issue of whether his right to a speedy trial was violated. However, appellate counsel properly filed a *Wende* brief declaring that she read the entire record and raising the issue of whether defendant's speedy trial rights were violated. (See *Anders*, *supra*, 386 U.S. at p. 744.)

We have now concluded our independent review of the record and found no arguable issues.

DISPOSITION

The matter is remanded to the trial court for the limited purpose of correcting the abstract of judgment to reflect that defendant was convicted by a jury. The trial court is directed to send the modified abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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HOLLENHORST
Acting P. J.

We concur:

KING
J.

MILLER
J.